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No. 02-1343

In The Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION and WESTERN STATES PETROLEUM ASSOCIATION,

Petitioners,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT BRIEF OF THE AMERICAN AUTOMOTIVE LEASING ASSOCIATION AND NATIONAL ASSOCIATION OF FLEET ADMINISTRATORS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION

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INTERESTS OF *AMICI CURIAE*

The American Automotive Leasing Association ("AALA") and the National Association of Fleet Administrators, Inc. ("NAFA") respectfully submit this joint brief in accordance with Supreme Court Rule 37.3.[1] *Amici* do so because the Court's interpretation of the fleet rules at issue ("Fleet Rules") will determine whether the South Coast Air Quality Management District ("SCAQMD") and hundreds of other localities may regulate fleets in a balkanized manner by prohibiting them from purchasing or leasing, on a locality-by-locality basis, vehicles that may otherwise be lawfully acquired.

A. American Automotive Leasing Association

AALA is a trade association representing the fleet leasing and management industry. The industry owns approximately 3,560,000 of the cars and light-duty vehicles used by businesses throughout the United States. While these vehicles are used predominantly for sales and service functions, the range of commercial and State and local governmental fleet usage is significant.

In contrast to the consumer car leasing business that limits itself to offering the retail public alternative financing, AALA members provide comprehensive fleet consulting and management services to commercial, non-profit, and governmental organizations. The range of services includes:

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[1] The parties consented to the filing of this brief, and copies of the parties' written consents have been filed with the Clerk of the Court. This brief was not authored in any part by counsel for any party, and no persons or entities other than *amici curiae*, its members, and counsel made a monetary contribution toward the preparation or submission of this brief.

(1) selecting and acquiring the most appropriate and cost-effective vehicle for the particular work to be performed;

(2) assisting in operating and maintaining those vehicles safely and economically, including designing and implementing fueling, maintenance, and safety programs, as well as ensuring compliance with State and local registration and operating requirements; and

(3) reclaiming, at the end of the lease, the highest value from the vehicle through auction, public sale, or other disposal.

B. National Association of Fleet Administrators, Inc.

NAFA members manage fleets of automobiles, light- and medium-duty trucks and/or vans for organizations in the United States and Canada. A substantial number of NAFA members manage vehicles operating in California. The majority of NAFA's members manages fleets for corporations, covering a wide range of manufacturing and service organizations. Some members work for governments (local, State, and federal) or public service entities (law enforcement, educational institutions, utilities, etc.), while others serve financial institutions, insurance companies, non-profit organizations, and the like. The typical NAFA member manages a fleet of approximately 1,200 vehicles. This management responsibility spans each vehicle's life cycle, from acquisition to final disposition.

NAFA's Pacific Southwest Chapter includes the fleet managers for many of the government jurisdictions in the South Coast area of California. NAFA's members include the fleet managers for many of the largest to many of the smallest jurisdictions. NAFA's 2,700 members collectively are directly responsible for managing 2.7 million vehicles.

STATEMENT OF THE CASE

Amici adopt the statement of the Petitioners, except to emphasize a few important facts the Court should consider in reaching its final decision in this case.

The fleet industry possesses several unique attributes that persuaded Congress to establish, in the 1990 amendments to the Clean Air Act, a federal clean-fuel vehicle program that governed how California and other States were to regulate fleets, if they were to be regulated at all. 42 U.S.C. §§ 7401-7671q (2003). That federal program included specific provisions that applied to certain fleets. Congress recognized that fleets could expedite the introduction of clean-fuel vehicles into the market, thereby furthering air quality goals. Congress also understood that those goals would be undermined if State and local governments regulated fleets in a balkanized manner. An appreciation of how fleets operate is thus critical to an analysis of the Fleet Rules.[2]

Fleets come in many sizes and forms. Some are small operations with just a few vehicles while others have tens of thousands of vehicles. Some consist of a mix of vehicle sizes (light-, medium-, and heavy-duty) while others are uniform. Some are owned and operated by government agencies, while others are private. Fleets may be centrally fueled or rely upon public refueling stations. Fleets may consist of either owned or leased vehicles. If the fleet owns

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[2] For EPA's description of the fleet industry in the context of the federal clean-fuel vehicle program, *see generally*, Clean Fuel Fleet Credit Programs, Transportation Control Measure Exceptions, and Related Provisions, 56 Fed. Reg. 50,196 (proposed Oct. 3, 1991) (noting that the fleet industry "is unlike most other regulated industries because the only common thread between [sic] members is the fact that they own and operate fleets of vehicles." *Id.*).

the vehicles, it typically possesses both title and registration, depending upon the nature of the vehicle's financing. If the fleet leases the vehicles, it typically holds registration while the lessor retains title. The fleet owner, operator, or manager may be a customer of a fleet leasing and management firm that provides the vehicles and support services.

The fleet leasing and management industry, which AALA represents, and professional fleet managers, which NAFA represents, share several characteristics that are important here. First, fleets are mobile, not stationary, sources. A vehicle may be in Los Angeles one day and Reno the next.[3] This is particularly the case with larger fleets that operate in interstate commerce. Because their inventory is on the move, fleets face higher costs and operational difficulties if their vehicles are regulated differently by each city in which they do business.[4] Uniformity in regulation is particularly key with respect to vehicle acquisition decisions, the activity which triggers the Fleet Rules. Havoc would result if, for example, Los Angeles compelled a fleet to acquire vehicles that operated on compressed natural gas while Reno mandated that the same fleet only acquire propane-fueled vehicles.

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[3] The vehicle movement that is particularly relevant here is that conducted by the fleet owner/operator in the management of his vehicle stock. The operator, for example, may shift vehicles among geographic areas in response to customer needs or business conditions. If the Fleet Rules are upheld, local governments could regulate these intra-fleet transfers in a conflicting manner.

[4] Clean Fuel Fleet Emission Standards, Conversions, and General Provisions and Amended Heavy-Duty Averaging, Banking and Trading Credit Accounting Regulations, 58 Fed. Reg. 32,474, 32,476 (proposed June 10, 1993) ("the need for uniformity among state programs is very important for fleets operating in more than one state").

Second, fleets provide tangible air quality and fuel economy benefits over general population vehicles because fleets are managed to extract the maximum economic value from each vehicle. Fleets generate environmental and energy benefits in numerous ways, including:

> *Fleet vehicles are better maintained, on average, than general population vehicles.* For economic and other reasons, fleets ensure that vehicles and their subsystems, such as emission control equipment, are properly inspected and maintained. Regular vehicle inspection and maintenance provide numerous benefits, including enhanced safety, improved emission performance, and better fuel economy. Properly maintained vehicles emit less pollution and consume less fuel. In contrast, general population vehicles tend to be poorly maintained, even when they are operated in regions of the country that are subject to Clean Air Act requirements relating to vehicle inspection and maintenance.
>
> *Fleet vehicles are "right-sized."* Vehicle size is an important factor in determining how much fuel a vehicle consumes. Fleets carefully select their vehicles to be no larger than is necessary for the task at hand, in large measure to conserve fuel and thus reduce costs. In contrast, the general population tends to acquire vehicles that may be larger than necessary (such as sport utility vehicles) or without regard to a vehicle's fuel economy.

Local regulations such as the Fleet Rules undermine these benefits by creating an incentive for managed fleets to disband in favor of driver reimbursement programs.

Fleets exist when the economics of vehicle acquisition, operation, maintenance, and disposal dictate that such decisions be made collectively in the form of a fleet. If the economics no longer work because a local regulator tells the fleet what vehicles to acquire, the fleet typically has the option of reconstituting itself as a driver reimbursement program. Employees in driver reimbursement programs use their personal vehicles to conduct company business and the company (or government agency), in turn, reimburses its employees for work-related expenses associated with the vehicles' use (fuel charges, for example). Because driver reimbursement programs rely upon employee-provided vehicles, the environmental and energy benefits previously provided by the managed fleet are lost.

Congress was well aware of these unique attributes of fleets when it enacted the federal clean-fuel vehicle program in 1990. Congress recognized that certain fleets, due to their centralized structure and relatively high inventory turnover, might expedite the introduction of clean-fuel vehicles into the marketplace. That laudable environmental goal would be undermined if State and local governments imposed a patchwork of well-intentioned local vehicle acquisition programs that made it more economical for fleets to convert to driver reimbursement programs.

To address that concern, Congress stipulated that if the States were to regulate fleets' vehicle acquisition decisions, they could do so only by adhering to minimum federal requirements. Congress established those requirements in the Clean Air Act's clean-fuel vehicle program by striking a careful balance among the competing interests of stringent federal controls, fleet autonomy, and State implementation. The Fleet Rules disrupt that balance.

SUMMARY OF ARGUMENT

Section 246 does not support enactment of the Fleet Rules. Properly construed in the context of the entire federal clean-fuel vehicle program in part C of title II of the Clean Air Act, section 246 instead is a limit on State discretion to regulate fleets. The State of California was aware of this fact when it opted out of section 246 a decade ago and replaced it with a non-fleet substitute program. That opt out undercuts SCAQMD's position that section 246 somehow supports the Fleet Rules.

Federal law makes clear that local efforts to regulate vehicle acquisition decisions by fleets, such as the Fleet Rules, are preempted. This conclusion follows from section 209, the Clean Air Act's express preemption provision, the language and legislative history of which indicate that localities are preempted from dictating to fleets what cars and trucks they may acquire. It also follows from section 246, a provision which separately occupies the field of fleet vehicle acquisition programs and sets national policy that such programs be implemented uniformly.

ARGUMENT

Petitioners have focused their attention on why the Fleet Rules constitute preempted "standards" under section 209(a) (42 U.S.C. § 7543(a)). *Amici* have lengthy experience with the fleet program provisions under section 246 of the Clean Air Act, 42 U.S.C. § 7586, and so are uniquely positioned to explain why the Fleet Rules are inconsistent with and separately preempted by the Clean Air Act's provisions governing clean-fuel vehicles and fleets.

I. THE FLEET RULES ARE INCONSISTENT WITH SECTION 246.

The Court of Appeals adopted without comment the District Court's assertion that section 246 suggests congressional support for local regulation of vehicle acquisition decisions by fleets:

> Furthermore, [section 246] expressly recognizes that Fleet Rules[5] must be established in areas with particularly high pollution levels, and authorizes restrictions on the purchase of fleet vehicles to meet clean-air standards. Specifically, section 246 requires that "each state in which there is located all or part of a covered area . . . shall submit . . . a state implementation plan revision . . . to establish a clean-fuel vehicle program for fleets under this section." Section 246 also mandates that "a specified percentage of all new covered fleet vehicles . . . purchased by each covered fleet operator in each covered area shall be clean-fuel vehicles and shall use clean alternative fuels." It is not rational to conclude that the CAA would authorize purchasing restrictions on the one hand, and prohibit them, as a prohibited adoption of a "standard" [under section 209], on the other.

[5] Although the District Court capitalized the term "Fleet Rules," it is unclear if the District Court was referring to SCAQMD's Fleet Rules or to fleet programs generally. As explained below, the Fleet Rules were not and could not have been issued pursuant to section 246 so it would be erroneous to conclude that the provision authorized them, as Respondents now suggest. *See* Respondents' Brief in Opposition to Petition for Certiorari, No. 02-1343 (April 14, 2003), at 4 ("Most significantly for purposes of the instant case, the CAA also authorizes states to adopt clean-fuel vehicle fleet rules, which have the same effect as the Fleet Rules in this case") (citing section 246); *id.* at 16 ("Congress not only foresaw purchase restrictions like these, it affirmatively authorized them") (citing section 246).

Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist., 158 F. Supp. 2d 1107, 1118 (C.D. Cal. 2001) (internal citations omitted); *see Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 309 F.3d 550, 551 (9th Cir. 2002) (adopting District Court's reasoning).

This interpretation misconstrues section 246 by neglecting to examine the provision in its statutory context.

A. Section 246 Is An Integral Part Of The Federal Clean-Fuel Vehicle Program That Was Intended To Prohibit Localities From Regulating Fleet Vehicle Acquisition Decisions In A Non-Uniform Manner.

Section 246 cannot be read in isolation but must be construed in the context of the Clean Air Act. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542, 549 (2001) (courts "must give meaning to each element" of the law and are "not at liberty to pick and choose which provisions in the legislative scheme" they will consider). Section 246 is part of the Clean Air Act's clean-fuel vehicle program, a statutory scheme that prohibits, not authorizes, localities from regulating fleet vehicle acquisition decisions in a balkanized manner.

Congress enacted the federal clean-fuel vehicle program in the 1990 amendments to the Clean Air Act as part of a new, comprehensive effort to spur the introduction of clean-fuel vehicles into highly polluted areas around the country, including Los Angeles. The federal program is set forth in part C of title II of the Clean Air Act and spans ten statutory sections: sections 241 (Definitions); 242

(Requirements applicable to clean-fuel vehicles); 243 (Standards for light-duty clean-fuel vehicles); 244 (Administration and enforcement as per California standards); 245 (Standards for certain heavy-duty clean-fuel vehicles); 246 (Centrally fueled fleets); 247 (Vehicle conversions); 248 (Federal agency fleets); 249 (California pilot test program); and 250 (General provisions). 42 U.S.C. §§ 7581-7590. Implementing regulations issued by the U.S. Environmental Protection Agency ("EPA") are in part 88 of title 40 of the Code of Federal Regulations.[6] EPA issued separate program guidance in 1998. *Clean Fuel Fleet Program Implementation Guidance* (EPA 420-R-98-011, Aug. 1998).

This federal plan is based upon "clean-fuel vehicles," which Congress defined as vehicles in certain weight classes that EPA had certified to meet specific standards. 42 U.S.C. §§ 7581(7), 7582, 7583, 7585; 40 C.F.R. Part 88 Subpart A.[7] Federally certified clean-fuel vehicles were to be used in two programs: (1) a federally administered Pilot Test Program for the State of California to demonstrate the effectiveness of clean-fuel vehicles in controlling air pollution (42 U.S.C. § 7589; 40 C.F.R. Part 88 Subpart B);[8] and (2) a federally administered Clean Fuel Fleet Program

[6] *See, e.g.*, 40 C.F.R. Part 88 Subpart A (Emission Standards for Clean-Fuel Vehicles), Subpart B (California Pilot Test Program), and Subpart C (Clean-Fuel Fleet Program) (2002).

[7] A current list of EPA-certified clean-fuel vehicles is available at http://www.epa.gov/otaq/cff.htm.

[8] The California Pilot Test Program was a federal mandate for the production, sale and distribution of clean-fuel light-duty vehicles and trucks to ultimate purchasers, including fleets subject to section 246. 42 U.S.C. § 7589(c)(1). The program also required California to make available clean alternative fuels for use in clean-fuel vehicles. *Id.* § 7589(c)(2)(A). Other States could opt into the California Pilot Test Program under certain conditions. *Id.* §§ 7589(f)(1), (4).

("CFFP") under section 246 for certain centrally fueled fleets (42 U.S.C. § 7586; 40 C.F.R. Part 88 Subpart C).

The CFFP is a critical part of the federal clean-fuel vehicle program because it provided a carefully tailored mechanism by which "covered fleets"[9] could be used to spur the introduction of EPA-certified clean-fuel vehicles into "covered areas"[10] that constituted many of the country's most populated regions, including Los Angeles. 42 U.S.C. §§ 7586(a), (b). Subject to limited opt-out rights (discussed further below), the CFFP required States

[9] A "covered fleet" is "10 or more motor vehicles which are owned or operated by a single person." 42 U.S.C. § 7581(5). Congress, and later EPA through regulation, specified (1) how vehicle ownership or control was to be used in the determination of a "covered fleet"; and (2) vehicle types that were exempt, such as vehicles used for law enforcement purposes. *Id.*; 40 C.F.R. § 88.302-94 (definitions of "control" and "owned or operated, leased or otherwise controlled by such person"). A "covered fleet vehicle" was limited to motor vehicles that (1) met EPA certification and related standards; and (2) were in "covered fleets" that were centrally fueled or capable of being centrally fueled. 42 U.S.C. § 7581(6).

[10] A "covered area" is (1) any ozone nonattainment area with a 1980 population of 250,000 or more classified as Serious, Severe or Extreme; and (2) any carbon monoxide nonattainment area with a 1980 population of 250,000 or more and a design value at or above 16.0 parts per million. 42 U.S.C. § 7586(a)(2). In the early 1990s, there were twenty-two "covered areas": (1) SCAQMD; (2) Atlanta; (3) Baltimore; (4) Baton Rouge; (5) Beaumont-Port Arthur; (6) Boston-Lawrence-Worcester; (7) Chicago-Gary-Lake County; (8) Denver-Boulder; (9) El Paso; (10) Greater Connecticut; (11) Houston-Galveston-Brazoria; (12) Milwaukee-Racine; (13) New York-Northern New Jersey-Long Island; (14) Philadelphia-Wilmington-Trenton; (15) Providence; (16) Sacramento Metro; (17) San Diego; (18) San Joaquin Valley; (19) Southeast Desert Modified Air Quality Management District; (20) Springfield (Western Massachusetts); (21) Ventura County; and (22) Washington (District of Columbia). Emission Standards for Clean-Fuel Vehicles and Engines, Requirements for Clean-Fuel Vehicle Conversions, and California Pilot Test Program, 59 Fed. Reg. 50,042, 50,043 (Sept. 30, 1994) (to be codified at 40 C.F.R. pt. 88).

(including California)[11] in which was located all or part of a "covered area" to impose a vehicle acquisition program on "covered fleet operators" through State Implementation Plan ("SIP") revisions. *Id.* § 7586(b); 40 C.F.R. § 88.302-94 (definition of "covered fleet operator"). The CFFP included both light- and heavy-duty vehicles, with the latter typically equipped with diesel engines that operate on diesel fuel. 42 U.S.C. § 7586(b).

The States' section 246 SIPs had to satisfy numerous prescriptive requirements that were spelled out in the Clean Air Act, federal regulations, and EPA's guidance document for the fleet program.[12] For example, the SIPs had to:

- be implemented by the State, not localities such as SCAQMD, through the SIP revision process (42 U.S.C. § 7586(a)(1));
- be vehicle- and fuel-neutral by stipulating that the "choice of clean-fuel vehicles and clean alternative fuels shall be made by the covered fleet operator" (*Id.* at § 7586(d));

[11] Six of the original twenty-two "covered areas" were in California. 59 Fed. Reg. *supra* at 50,043. In addition to California, the twenty-two "covered areas" fell within the following States: (1) Georgia; (2) Maryland; (3) Louisiana; (4) Texas; (5) Massachusetts; (6) New Hampshire; (7) Illinois; (8) Indiana; (9) Colorado; (10) Connecticut; (11) Wisconsin; (12) New Jersey; (13) New York; (14) Delaware; (15) Pennsylvania; (16) Rhode Island; (17) Virginia; and (18) the District of Columbia. *Id.*

[12] Not all aspects of the CFFP were to be implemented through SIPs. Some requirements, such as labels for heavy-duty clean-fuel vehicles, were directly imposed on the States by EPA. 40 C.F.R. § 88.305-94. Congress also directed EPA to issue regulations to "ensure that certain transportation control measures including time-of-day or day-of-week restrictions, and other similar measures that restrict vehicle usage, do not apply to any clean-fuel vehicle that meets the requirements of this section." 42 U.S.C. § 7586(h); 40 C.F.R. § 88.307-94.

- require a specified percentage of "all new covered fleet vehicles . . . purchased by each covered fleet operator in each covered area" to use clean alternative fuels,[13] including but not limited to diesel, when operating in the covered area (*Id.* at § 7586(b));
- provide maximum flexibility to fleet operators by, for example, "taking into consideration operational range, specialty uses, vehicle and fuel availability, costs, safety, resale value of vehicles and equipment and other relevant factors" (*Id.* at § 7586(a)(4));
- take "all measures necessary" to make the program "economic from the standpoint of vehicle owners" (*Id.* at § 7511a(c)(4)(A));
- require fuel providers "to make clean alternative fuel available to covered fleet operators at locations at which covered fleet vehicles are centrally fueled" (*Id.* at § 7586(e));
- include a credit program for fleet operators (*Id.* at § 7586(f); 40 C.F.R. § 88.304-94);
- allow covered fleet operators to satisfy regulatory requirements through vehicle conversions (42 U.S.C. § 7587; 40 C.F.R. § 88.306-94); and

[13] Congress defined "clean alternative fuel," in part, as "any fuel (including methanol, ethanol, or other alcohols (including any mixture thereof containing 85 percent or more by volume of such alcohol with gasoline or other fuels), reformulated gasoline, **diesel**, natural gas, liquefied petroleum gas, and hydrogen) or power source (including electricity) used in a clean-fuel vehicle. . . . " 42 U.S.C. § 7581(2) (emphasis added).

- satisfy percentage vehicle acquisition requirements, by model year (42 U.S.C. § 7586(b)).[14]

In a few instances, EPA granted the States discretion to implement the federal program in a manner to meet local needs. For example, EPA allowed the States to grant compliance exemptions in situations where the fleet operator was unable to acquire the necessary vehicles. These limited grants of federal discretion did not touch upon core program considerations, such as vehicle- and fuel-neutrality, that were dictated by federal law. EPA viewed the limited amount of State flexibility under the federal scheme as important but necessarily narrow in scope.[15]

Against the backdrop of part C of title II of the Clean Air Act, section 246 cannot logically be read to reflect congressional support for the Fleet Rules. *Engine Mfrs. Ass'n*, 309 F.3d at 551. For example, section 246 is inextricably linked to federal "clean-fuel vehicles." The Fleet Rules have nothing to do with "clean-fuel vehicles." 42 U.S.C. § 7581(7).

In the State of California, section 246 is also tied to the California Pilot Test Program under section 249, a

[14] The CFFP was supposed to begin in model year 1998. 42 U.S.C. § 7586(b). EPA subsequently delayed the implementation date to model year 1999 due to vehicle availability issues. Clean Fuel Fleet Programs, 63 Fed. Reg. 20,103 (April 23, 1998) (to be codified at 40 C.F.R. pt. 88).

[15] *See Clean Fuel Fleet Program Implementation Guidance*, at 4 (EPA 420-R-98-011, Aug. 1998) ("EPA's interpretation allowing this narrow and limited use of state discretion with regard to compliance exemptions is applicable to only Section 246(a)(4)"); 58 Fed. Reg. *supra* at 32,476 ("after careful consideration of . . . relevant CAA provisions, EPA agrees with the concerned parties that regulations governing key program definitions are necessary for the effective and efficient implementation of the fleet program").

separate initiative to provide California fleets with sufficient quantities of clean-fuel vehicles, including certified cars and trucks operating on diesel fuel. 42 U.S.C. § 7589. By limiting vehicle choice through prohibitions on the acquisition of diesel vehicles, Fleet Rules flatly contradict the purpose of section 249.

Even if section 246 could rationally be read out of context from part C of title II of the Clean Air Act, Respondents have conveniently avoided the many requirements of section 246 that the Fleet Rules contradict, most notably the provision's requirement that fleet programs be vehicle- and fuel-neutral. It is true that Congress authorized fleet programs in section 246. Congress did so, however, in a prescriptive manner that stipulates in almost excruciating detail how the States and specific localities within those States, including the SCAQMD, could regulate fleet vehicle acquisition decisions. Read in full, section 246 is a limit on local fleet regulation rather than a grant of unfettered regulatory authority to the SCAQMD.

B. The Fleet Rules' Reliance On Section 246 Is Undermined By The State Of California's Decision To Opt Out Of The Section 246 Fleet Program.

The Clean Air Act gave the States, including California, the right to opt out of the CFFP and replace it with a substitute program, subject to federal approval. 42 U.S.C. § 7511a(c)(4)(B). In addition to being contingent upon federal approval, substitute programs had to meet a two-prong test. First, they had to consist "exclusively of provisions other than those required under this chapter for the area"; and second, they had to achieve, in EPA's judgment, emission reductions equivalent to those that would have been generated by the federal clean-fuel vehicle program. *Id.* Because the CFFP program was separately required to

be implemented in the SCAQMD, the first prong of this two-part test prohibited California from electing, as a substitute for the CFFP, a fleet program such as the Fleet Rules that failed to conform to the federal scheme.[16]

California exercised its opt-out rights and thus never submitted a CFFP SIP under section 246.[17] California elected to use its Low Emission Vehicle ("LEV") regulations as the substitute program. The LEV program was an acceptable substitute because it satisfied the opt-out provision's two-prong test. *Id.* In particular, the LEV program was not otherwise required to be implemented in California under the Clean Air Act. *Id.*

This history casts the SCAQMD's reliance on section 246 in this case in an entirely different light. Congress did not merely, as Respondents suggest, authorize the States

[16] The opt-out provision appears in the section of the Clean Air Act dealing with general SIP requirements. 42 U.S.C. §§ 7511a(c)(4)(B), (d), (e). The provision indicates that States may opt out of "all or a portion of the clean-fuel vehicle program prescribed under part C of subchapter II" which includes the California Pilot Test Program and the CFFP. 42 U.S.C. § 7511a(c)(4)(B). The "portion of" language should not be construed to allow States to dismantle the carefully prescribed federal fleet program in section 246 by selectively implementing only those elements that appeal to them. The opt-out provision does not refer to "all or a portion of the clean-fuel fleet program in section 246," and given the numerous restrictions that Congress built into the section 246 program, it would be irrational to interpret the opt-out authority to allow that outcome. *Lorillard Tobacco Co.*, 533 U.S. at 542. In any event, when California sought federal approval of its decision to opt out of section 246, the State informed EPA that it was opting out of the entire provision, not a portion of it. It thus is too late in the day for SCAQMD to claim that the opt-out provision somehow authorizes its Fleet Rules.

[17] Conditional Approval of California's Substitute Program for the Clean-Fuel Fleet Program, 58 Fed. Reg. 62,532 (Nov. 29, 1993) (to be codified at 40 C.F.R. pt. 52).

to regulate fleets in an open-ended manner (*Engine Mfrs. Ass'n*, 309 F.3d at 551). Congress instead gave the States a choice – either regulate fleets in the manner prescribed by section 246, or implement a substitute program consistent with the restrictions provided by the Clean Air Act's opt-out provision. 42 U.S.C. § 7511a(c)(4)(B). California chose the latter course a decade ago when it pledged to EPA that the State would implement its LEV regulations in lieu of section 246.[18] The Fleet Rules are not part of the LEV program and SCAQMD was, and is, bound by California's choice. Given that background, SCAQMD's reliance on section 246 to defend its Fleet Rules is ironic.

In upholding the Fleet Rules, the Court of Appeals effectively allowed California to negate its opt-out commitment to EPA. The Clean Air Act does not authorize the States, let alone localities such as the SCAQMD that are regulated under section 246, to change their opt-out decision without federal oversight. Because they are the product of a unilateral decision by a locality that circumvents the federal approval process for substitute programs that Congress established for fleet vehicle acquisition programs under section 246, the Fleet Rules are unauthorized under, not supported by, the Clean Air Act.

C. The Fleet Rules Render Section 246 Meaningless.

Respondents' interpretation of section 246 is erroneous because it would allow localities (including the

[18] When it sought EPA approval of the LEV program as a substitute for the CFFP under section 246, California even discussed how its decision would impact the SCAQMD. Conditional Approval of California's Substitute Program for the Clean-Fuel Fleet Program, 58 Fed. Reg. 27,253, 27,255 (proposed May 7, 1993).

SCAQMD) that were specifically regulated under that provision to implement a fleet program that conflicts with section 246. That outcome renders the provision meaningless. *Duncan v. Walker*, 533 U.S. 167, 173 (2001).

Surely if Congress had intended to allow the SCAQMD to regulate fleets in a manner that conflicts with section 246, Congress would have said so explicitly because such a result would have marked a striking departure from the carefully crafted federal clean-fuel vehicle scheme under part C of title II of the Clean Air Act. The failure of Congress, either in statutory language or legislative history, to say anything in support of local enactment of rogue fleet programs such as the Fleet Rules reveals Respondents' interpretation of section 246 to be flawed. *Chisom v. Roemer*, 501 U.S. 380, 396 (1991).

II. SECTION 209 EXPRESSLY PREEMPTS STATE AND LOCAL REGULATION OF VEHICLE ACQUISITION DECISIONS BY FLEETS.

The Fleet Rules must satisfy the Supremacy Clause of the United States Constitution, which commands that Federal laws "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Federal preemption may be either express or implied (*Lorillard Tobacco Co.*, 533 U.S. at 540-541), and local ordinances are analyzed the same as state laws (*Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991)). When assessing whether a local enactment is preempted, the courts are "not at liberty to pick and choose which provisions in the [federal] legislative scheme" they will consider, but instead must examine the federal law as a whole. *Lorillard Tobacco Co.*, 533 U.S. at 549.

Two subsections of section 209, the relevant express preemption provision, are at issue here:

> (a) No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment . . .
>
> (d) Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.

42 U.S.C. § 7543(a), (d).

Faced with these provisions, the District Court only analyzed the first sentence of subsection (a) and concluded that it merely preempts local "standards" that have an impact on auto manufacturers. "Where a state regulation does not compel manufacturers to meet a new emissions limit, but rather affects the purchase of vehicles, as the Fleet Rules do, that regulation is not a standard" that is preempted under section 209. *Engine Mfrs. Ass'n*, 158 F. Supp. 2d at 1118. The District Court effectively rewrote the first sentence of section 209(a) to read: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard (i) relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part **and (ii) imposing a burden on manufacturers of the same**" (emphasis added). This

judicial rewrite of section 209 was also adopted by the Court of Appeals.

The lower courts erred in grafting a "manufacturer-protection" limit onto the first sentence of section 209(a). First and foremost, that is not what the sentence says. The focus of that sentence is on State and local requirements without regard to the entity that is regulated. It expressly preempts State and local actions that constitute "standard[s] relating to the control of emissions" from new motor vehicles or engines that are "subject to this part." The term "manufacturer" appears nowhere in section 209, let alone the first sentence. Congress provided a definition of "manufacturer" in section 216 (42 U.S.C. § 7550(1)) and indicated the provisions of title II to which that definition applied (sections 202, 203, 206, 207, and 208), notably excluding section 209. If Congress had intended the term "manufacturer" to be included or otherwise read into section 209, it presumably would have said so. *Chisom*, 501 U.S. at 396.

Reading section 209(a) narrowly to limit federal preemption to local regulations that impact manufacturers alone also places the subsection at odds with the remainder of the provision. Section 209(d), for example, preserves the authority of State and local governments to regulate the "use, operation, or movement" of registered or licensed motor vehicles. Regulations pertaining to the "use, operation, and movement" of motor vehicles impose burdens on vehicle purchasers, owners, and lessors, not manufacturers. If section 209(a) is limited to regulations that only burden manufacturers, section 209(d) is rendered null. *Duncan*, 533 U.S. at 173-174. Section 209(d) only has meaning if section 209(a) preempts local regulations such as the Fleets that prohibit vehicle users from purchasing

or leasing vehicles that may otherwise be lawfully required.[19]

The legislative history confirms that Congress intended vehicle users such as fleets to fall within the scope of section 209. Section 209 has its roots in the 1965 National Emission Standards Act, which authorized the federal Department of Health & Human Services to set national emission standards for new motor vehicles. The 1965 law was passed in response to efforts by California and other States to regulate new motor vehicle emissions.

[19] This interpretation of section 209(d) is consistent with the reasoning of *Metro Systems Corp. v. City of New York*, No. 78 Civ. 6146, 1979 U.S. Dist. LEXIS 14837 (S.D.N.Y. Jan. 26, 1979) and *Allway Taxi, Inc. v. City of New York*, 340 F. Supp. 1120 (S.D.N.Y.), *aff'd*, 468 F.2d 624 (2d Cir. 1972), two cases which upheld municipal taxi ordinances that required vehicles to meet certain air pollution standards. The *Metro Systems* court noted that the challenged regulations "only [took] effect subsequent to and apart from the initial, all-encompassing licensing scheme of the State of New York." 1979 U.S. Dist. LEXIS 14837, at *14. Likewise, the *Allway Taxi* court cautioned that the imposition of State emission standards immediately after a new car is acquired and registered "would be an obvious circumvention of the Clean Air Act and would defeat the Congressional purpose" behind section 209. *Allway Taxi*, 340 F. Supp. at 1124. *Metro Systems* and *Allway Taxi* support the uncontested proposition that section 209 does not prohibit States from imposing certain in-use requirements on motor vehicles at some point after the new vehicle is originally sold or leased to the user.

In a legal opinion issued in 1972, just a few years after section 209 was enacted, EPA's General Counsel similarly concluded that a State vehicle regulation would only survive preemption if "**a reasonable time following initial retail sale** (e.g., one year after such sale or upon second sale, second titling, or second registration)" had passed before the regulation took effect. U.S. EPA, General Counsel Opinion, "Transportation Control Plans" (Aug. 11, 1972) (emphasis added). The Fleet Rules, which prohibit fleets from acquiring new vehicles in the first instance, do not pass this test of reasonableness.

When considering the 1965 law, the Senate Committee on Public Works stated that "it would be more desirable to have national standards rather than for each State to have a variation in standards and requirements which could result in chaos insofar as manufacturers, dealers, **and users** are concerned." S. Rep. No. 89-192, at 6 (1965) (emphasis added). The Committee offered the hope that "individual States will accept national standards rather than additionally impose restrictions which might cause undue and unnecessary expense **to the user**." *Id.* at 8 (emphasis added). Although the 1965 Act did not contain a preemption provision, it also did not contain an express authorization for California to continue down the path of a separate regulatory scheme. *See* David P. Currie, *Motor Vehicle Air Pollution: State Authority and Federal Preemption,* 68 Mich. L. Rev. 1083, 1087 (1970) (hereinafter "*Motor Vehicle Air Pollution*") ("Although the pre-emption provision was not enacted until 1967, the 1965 history is pertinent, since several individuals indicated concern at that time with the pre-emption problem").

Between 1965 and 1967, several States continued to enact legislation related to vehicle emissions. Congress responded to these efforts by enacting the 1967 Air Quality Act. The 1967 Act included the identical language that appears in sections 209(a) and (d) today (then sections 208(a) and (c)). The preemption language emerged following hearings by a subcommittee of the Senate Public Works Committee that dealt with the "automotive problem alone." *Motor Vehicle Air Pollution*, at 1089. Because the hearings focused on vehicle manufacturers, it is little surprise that the legislative history reflects an emphasis on their concerns.

Manufacturers were not Congress' exclusive concern in 1967 when it enacted the relevant provisions of section 209, however. Congress enacted section 209(d) (then section 208(c)) at the same time, a provision which, as

explained above, affects vehicle users such as fleets, not manufacturers. Congress intended both vehicle users and manufacturers to fall within the scope of section 209. *See* H. Rep. No. 90-728 (1967), reprinted in 1967 U.S.C.C.A.N. 1938, 1955-56 (noting that federal preemption is necessary to preclude "chaos" to vehicle users).[20]

The legislative history thus does not support an interpretation of section 209 that somehow limits that provision's reach to matters involving manufacturers. Congress specifically and repeatedly referred to vehicle "users," a class of persons that implicitly if not explicitly excludes manufacturers. Because fleets "use" vehicles, it is clear that Congress intended section 209 to cover fleets as well.

The legislative record takes on added significance here because local, not State, regulation is involved. Congress plainly was worried that vehicle users such as fleets would face different and costly standards if the scope of federal and State responsibilities was not carefully defined. Surely if Congress was worried about conflicting vehicle user

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[20] Upon review of these and other legislative materials, a member of the Illinois Air Pollution Control Board wrote that section 209 was enacted:

> to protect the manufacturer against having to build engines which would comply with a multiplicity of standards (Senator Muskie); **to protect the vehicle owner from having to deal with different standards in each state in which he drives** (Senator Muskie); to avoid the unnecessary duplication of federal standards ([HEW Deputy] Undersecretary Coston); **to avoid "unnecessary expense" to the owner** (the Senate Public Works Committee); and generally to avoid "chaos" and "confusion" (Thomas Mann [of the AMA], Undersecretary Coston, and the Senate Public Works Committee).

Motor Vehicle Air Pollution, at 1090-91 (emphasis added).

requirements at the State level, it also was worried about conflicting requirements at the local level. Against that record, it strains credibility to believe that the Fleet Rules, which allow a local government to dictate to fleets what vehicles they may acquire, are somehow consistent with the legislative history of section 209.

III. SECTION 246 SEPARATELY PREEMPTS THE FLEET RULES ON IMPLIED PREEMPTION GROUNDS.

In a one-sentence footnote, the Court of Appeals declined to consider whether section 246 separately preempts the Fleet Rules on implied preemption grounds, considerations that *amici* raised in their brief below. *Engine Mfrs. Ass'n*, 309 F.3d at 551 n.1. The Court of Appeals did so in reliance on *Swan v. Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993), *cert. denied*, 513 U.S. 985 (1994) for the proposition that courts generally will not consider arguments raised on appeal only by *amici*.

The Court of Appeals erred in declining to consider *amici*'s implied preemption arguments. "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). The meaning and application of section 246 are at issue in this case, and thus *amici*'s arguments (1) were properly before the Court of Appeals, and (2) are properly before the Court.[21]

[21] *Amici*'s position is unlike that of *amici* in *New Jersey v. New York*, 523 U.S. 767, 781 n.3 (1998) There, *amici* took positions that the party which they were supporting had essentially renounced. Petitioners here have not renounced *amici*'s interpretation of section 246.

(Continued on following page)

The District Court discussed the relationship between section 209 and 246 when assessing whether the Fleet Rules were preempted. Respondents similarly seek to justify the Fleet Rules on the theory that section 246 limits the scope of express preemption under section 209. *See* note 5, *supra*. *Amici* thus are not raising novel claims that are tangential to the Court's resolution of whether section 209, alone or in conjunction with section 246, preempts the Fleet Rules. *Amici* instead seek to bring to the Court's attention legal claims that are intimately related to those already at issue – namely, that section 246 does not limit express preemption under section 209, but instead separately and independently preempts the Fleet Rules on implied preemption grounds.

A. Congress Occupied The Field Of Fleet Vehicle Acquisition Programs.

A State or local law is preempted if the "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *accord City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973). The analysis turns on the "peculiarities and special features of the federal regulatory scheme in question." *City of Burbank*, 411 U.S. at 638. Even if the local control is "deep-seated in

Moreover, unlike *amici* here, *amici* in *New Jersey* sought to overturn Court precedent and raised matters that were not in controversy. Finally, *Swan v. Peterson* grants the Court of Appeals discretion to consider *amici*'s arguments because they touch upon issues of federalism and are purely legal. *Swan*, 6 F.3d at 1383.

the police power of the States," it is preempted in the face of a pervasive federal scheme. *Id.*

The pervasive nature of the federal clean-fuel vehicle program (including section 246) reveals a congressional intent to occupy the field of fleet vehicle acquisition programs of the type at issue here. In section 246, for example, Congress specified, in part: (1) the geographic locations where fleets were to be regulated (specifically including the SCAQMD); (2) the type and size of fleets that were to be regulated; (3) the type and quantities of vehicles those fleets were to acquire; and (4) the type of fuels, including diesel, that would qualify for the program. 42 U.S.C. § 7586. For States such as California that elected to opt out of the section 246 program, Congress carefully limited that choice by (1) subjecting the State's opt-out decision to federal approval, and (2) prohibiting local enactment of rogue fleet programs as a substitute for section 246. *Id.* § 7511a(c)(4)(B).

The Fleet Rules intrude upon and contradict this pervasive federal scheme. They are not authorized under section 246 and conflict with the provision's procedural and substantive requirements. They are not part of the LEV program, California's EPA-approved substitute for the section 246 program. They were never reviewed or approved by EPA, contrary to the congressional requirement that all section 246 substitute programs be approved by federal authorities.

It is too late in the day for Respondents to defend the Fleet Rules on the theory that they are shielded from field preemption because they are based upon California's police powers or SCAQMD's pioneering role in air pollution matters. *Amici* do not question the leading role that California and SCAQMD have played in air quality issues over the years. However, that history is irrelevant here in light of the fact that Congress occupied the field of fleet

vehicle acquisition programs no later than 1990, when section 246 and the other provisions of the federal clean-fuel vehicle program became law.[22] Additionally, this case deals with mobile sources, an area where the federal interest dominates over State and local concerns. *City of Burbank*, 411 U.S. at 639.[23]

The fact that Congress occupied the field of fleet vehicles acquisition programs no later than 1990 is consistent with the continuing expansion of federal power over local air quality matters. With each subsequent amendment of the Clean Air Act, for example, Congress advanced further into State and local matters.[24] That accretion of federal power largely explains why the Clean Air Act has become the most complex environmental law ever enacted.

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[22] Any pre-1990 State of California legislation that purports to authorize the Fleet Rules would itself be preempted.

[23] Similarly, in congressional testimony in 1964, Warren Dorn of the Air Pollution Control Board, Los Angeles County Board of Supervisors, revealed that he wrote to the President of the United States to argue for greater Federal oversight of mobile sources because "neither the county of Los Angeles nor any other agency of local government has the legal authority" to adequately address air pollution from mobile sources. Hearings Before a Special Subcommittee on Air & Water Pollution, 88th Cong., at 23 (1964). This statement by a key local regulator undermines Respondents' assertion that the SCAQMD has historically regulated mobile sources.

[24] Vehicle inspection & maintenance ("I/M") programs provide a relevant example. I/M programs require vehicles to be inspected to ensure, among other things, that their emission control systems are functioning properly. An I/M program is a classic example of a local program that regulates the "use, operation, or movement" of motor vehicles, a subject matter that Congress reserved to localities in 1967 when section 209(d) was enacted. Since that time, Congress has hardly treated I/M programs as a matter of exclusive local control that is exempt from federal reach. Just the opposite is true. *See, e.g.*, 42 U.S.C. § 7511a(c)(3) (federal imposition of "enhanced I/M" requirements on State and local authorities).

Against that backdrop, the Court should treat with skepticism Respondents' claims that there is something inherently "local" about fleet programs that places them outside the realm of federal control.

B. The Fleet Rules Undermine Federal Policy That Fleet Vehicle Acquisition Decisions Be Regulated Uniformly.

A local enactment is preempted if it conflicts with the federal scheme. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-74 (2000). Conflict preemption exists when a local ordinance "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Congress' purpose in establishing the section 246 program was to ensure that fleets were regulated uniformly throughout the country.[25]

The Fleet Rules, which stand for the proposition that local governments are free to regulate vehicle acquisition decisions by fleets in a manner that conflicts with the federal scheme, undermine that purpose. Indeed, under Respondents' interpretation of the Clean Air Act, cities throughout the United States could regulate the same fleet differently, a situation that would lead to untenable results and contravene the careful policy choices regarding fleets that Congress set forth in part C of title II of the Clean Air Act.

The Court has not hesitated to strike down local enactments that "aim[ ] precisely at the same ends" as the

[25] Clean Fuel Fleet Emission Standards, Conversions, and General Provisions and Amended Heavy-Duty Averaging, Banking and Trading Credit Accounting Regulations, 58 Fed. Reg. 32,474 (proposed June 10, 1993).

relevant federal law. *Ray*, 435 U.S. at 165. Here, both Congress and SCAQMD seek to spur the introduction of cleaner-burning vehicles by imposing vehicle acquisition requirements on fleets. SCAQMD does so, however, in a manner that "[r]efuse[s] to accept the federal judgment" about how that task was to be accomplished. *Id.* In *Ray*, the Court was troubled by the fact that the State of Washington sought to exclude from Puget Sound vessels that the federal government had otherwise certified for that use, and thus found those and related aspects of the State law to be preempted. *Id.* Similarly here, the SCAQMD (1) prohibits fleets from acquiring vehicles that meet all other applicable federal standards, and (2) regulates fleets in a manner that violates section 246. Because the Fleet Rules thus conflict with the approach for fleet regulation set forth by Congress, they are preempted.

CONCLUSION

The decision of the Court of Appeals should be reversed because the Fleet Rules are expressly preempted by section 209, a provision that shields fleets from local regulation of their vehicle acquisition decisions. Nothing in section 246 limits the scope of federal preemption of the Fleet Rules or supports their enactment. The Fleet Rules instead violate section 246's prescriptive procedural and substantive requirements.

Alternatively, the decision of the Court of Appeals should be remanded to address why section 246 separately preempts the Fleet Rules on implied preemption grounds. In enacting section 246, Congress occupied the field of vehicle acquisition programs for fleets. The Fleet Rules

intrude upon that domain and frustrate federal policy that fleets be regulated uniformly, if at all.

Respectfully submitted,

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